Supreme Court, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

(4)

No. 94-1033

In the

Supreme Court of the United States

October Term, 1993

COMPUTER CURRICULUM CORPORATION,
Petitioner,

v.

INSTRUCTIONAL SYSTEMS, INC.
and
DEBORAH T. PORITZ, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Third Circuit

Brief in Opposition

Deborah T. Poritz
Attorney General of New Jersey
Attorney for State Respondent
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(201) 648-4876

Joseph L. Yannotti
Assistant Attorney General
Of Counsel

Bertram P. Goltz, Jr.
Deputy Attorney General
Counsel of Record and On the Brief

34 pp

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF CASE..... 1

SUMMARY OF ARGUMENT..... 13

ARGUMENT.....14

NOT ONLY DOES THE NEW JERSEY FRANCHISE PRACTICES ACT CLEARLY REGULATE EVEN-HANDEDLY TO PROTECT FRANCHISEES FROM MORE POWERFUL FRANCHISORS WITH ONLY THE INCIDENTAL EFFECTS ON INTERSTATE COMMERCE PRODUCED BY ANY REGULATORY SCHEME, BUT THE HOLDING SOUGHT BY THIS PETITIONER WOULD PRODUCE LAISSEZ FAIRE IN THE INTERSTATE ARENA BY STRIPPING FROM THE STATES ALL REGULATORY POWER HAVING ANY EXTRA-TERRITORIAL EFFECT, AND THEREFORE THE PETITION FOR CERTIORARI SHOULD BE DENIED.

CONCLUSION 29

CASES CITED

Amerada Hess Corporation v. Quinn,
143 N.J. Super. 237 (Law Div. 1976).....18

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520, 79 S.Ct. 962,
3L.Ed.1003(1959).....21

Page

Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed. 2d 552 (1986).....10

Edgar v. MITE Corporation, 457 U.S. 524, 102 S.Ct. 2629, 73 L.Ed. 2d 269 (1982).....20

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 410 (1964).....2,8

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).....16

Healy v. Beer Institute, Inc., 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed. 2d 275 (1989).....10,19

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960).....19,23

Instructional Systems, Inc. v. Computer Curriculum Corporation, 826 F. Supp. 831 (D.N.J. 1993).....1,7,14

Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d 813 (3d Cir. 1994).....1,8,14,15,19,21,26,28

Instructional Systems, Inc. v. Computer Curriculum Corporation, 130 N.J. at 358..... 6,10,28

Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).....16

Page

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).....22

Manning Engineering, Inc. v. Hudson County Park Commission, 74 N.J. 113 (1977).....23

Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division, 190 N.J. Super. 153 (App. Div. 1983).....6

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970) 5,11,13,14,15,27

Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)..... 2,8

Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977)..... 21

Shell Oil Company v. Marinello, 63 N.J. 402 (1973), cert. den. 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974).....24,25

Southern Pacific Company v. Arizona ex rel. Sullivan, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).....21

Swift v. Tyson, 41 U.S. 1, 10 L.Ed. 865(1842).....16,26

Westfield Centre Service, Inc. v. Cities Service Oil Company, 86 N.J. 453 (1981).....17,18

Page

STATUTES CITED

N.J.S.A 12A:2-302(1).....27

N.J.S.A. 56:10-1 et seq.....1

N.J.S.A. 56:10-2.....17

N.J.S.A. 56:10-3a.....6

N.J.S.A. 56:10-4.....9

N.J.S.A. 56:10-5.....6,17,25

28 U.S.C.A. § 2403(b).....1

OTHER AUTHORITIES CITED

Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev 1865 (1987).....19

Kenneth Culp Davis Administrative Law Treatise (1958).....19

COUNTERSTATEMENT OF THE CASE

This litigation is between the plaintiff Instructional Systems, Inc. ("ISI") and the defendant Computer Curriculum Corporation ("CCC"), ISI being the New Jersey franchisee of CCC and marketing in New Jersey and at one point in almost a dozen other states a computerized teaching system; the Attorney General of New Jersey intervened as of right under 28 U.S.C.A. § 2403(b) when CCC contended that in its extraterritorial application the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 et seq., was unconstitutional under the Commerce Clause. On June 2, 1993, the United States District Court for the District of New Jersey held the Act unconstitutional on that account, Instructional Systems, Inc. v. Computer Curriculum Corporation, 826 F. Supp. 831 (D.N.J. 1993), but on September 16, 1994 the United States Court of Appeals for the Third Circuit reversed. Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d 813 (3d Cir. 1994). CCC having now petitioned this Court for certiorari, the Attorney General of New Jersey is filing this brief opposing that petition.

The plaintiff ISI is a New Jersey corporation having its primary place of business in New Jersey, while the defendant CCC is a Delaware corporation which is headquartered in Palo Alto, California and which produces and markets a computerized teaching system. Between 1974 and 1989, ISI was the exclusive distributor of CCC products in the Northeast, with the 1984-1989 period governed by a "Reseller Agreement" under whose terms ISI was the exclusive "reseller" of CCC products to certain categories of customers in New Jersey as well as in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont and Washington, D.C. The breadth of that territory was significantly narrowed in 1989, however. Assertedly dissatisfied with the ISI sales performance in much of the territory, CCC offered ISI a two-year contract which would encompass only New Jersey, New York and Massachusetts,

the three states in which ISI's marketing had been most successful; CCC would itself market its products in the remainder of the former ISI territory. Although ISI executed the new contract, it also sued CCC in the Chancery Division of the New Jersey Superior Court, alleging, among other matters, that ISI had been coerced into signing the new contract and that CCC had violated the New Jersey Franchise Practices Act.

CCC removed the suit to federal court on the basis of diversity of citizenship, but, on ISI's motion, the case was remanded to the New Jersey courts for consideration of State law issues, in particular, the extraterritorial effect of the Act. Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 410 (1964). After decisions by both the Chancery Division and the Appellate Division of Superior Court, the New Jersey Supreme Court held not only that the business relation between CCC and ISI is a "franchise" as defined by the Franchise Practices Act, Instructional Systems, Inc. v. Computer Curriculum Corporation, 130 N.J. 324, 347-66 (1992), but that the statute does have extraterritorial reach. Id. at 366-72.

In so deciding the latter issue, the New Jersey Supreme Court first addressed the question of choice of law. The 1984 Reseller Agreement specified that the legal relations betwen ISI and CCC would be governed by California law, and ordinarily the New Jersey courts will uphold the contractual choice if it does not violate New Jersey public policy. Id. at 341. Here, however, New Jersey did have a materially greater interest than California regarding ISI's rights under the agreement. Id. at 342-46. The New Jersey Supreme Court rejected CCC's argument that would split the contract into sales that occur in New Jersey and sales that occur in other States. Id. at 344. As the court said, "The

purpose behind franchise-act legislation is that dealers geographically 'situated' in a forum state are to be the desired beneficiaries of the legislation in order to make their bargaining position more equal to manufacturers," id. at 344-45 (citation and internal quotation marks omitted), and "[t]o strip away the spokes of a 'hub-type' franchise would counter the purpose of such legislation." Id. at 345.

> [A]ssume that an automobile manufacturer gave a franchise to a dealer in Montvale, New Jersey to serve northern Bergen County, New Jersey as well as Rockland County, New York. Would we assume that the New Jersey Legislature would be indifferent to the dealer's plight if, after [the dealer's] having made a substantial investment in the fixed plant and having created a market for the manufacturer's vehicle in Rockland County, the manufacturer, without good cause, took over the Rockland County market for itself? [Id. at 345]

ISI's situation, though not identical, was analogous. Few franchises are intrastate, and if parties were free to dispense with the protection afforded by franchise acts, any large franchisor, by insertion of a choice of law provision requiring the application of the franchisor's home State's law, could with a stroke of a pen remove the beneficial effect of the remedial legislation provided by the franchisee's State. Ibid.

> As the New Jersey Act and the cases interpreting it make clear, New Jersey has a strong policy in favor of protecting its franchisees. In this case, New Jersey has significant "contacts" with the transaction. The franchise is located here and the majority of ISI's employees reside in New Jersey. The franchise-specific investments ... relate primarily to the assets in New Jersey and the goodwill developed for CCC by New Jersey

> residents. New Jersey would undoubtedly be the state of applicable law had no choice-of-law provision existed. [Id. at 345-46]

Because ISI maintained a place of business in New Jersey and met all other requirements of the statute, New Jersey had the overriding interest in the fair treatment of its franchisee. Id. at 346.

The New Jersey Supreme Court then turned to the extraterritoriality aspect proper, considering it from the perspectives of both the Commerce Clause and the Due Process Clause. The court acknowledged that "[o]bviously, New Jersey has no power, and therefore no interest, to regulate commerce that occurs entirely beyond its borders." Id. at 367. Nevertheless, "[a] State's power over its own citizens should extend to protection of its own citizens' rights when dealing with others even though there may be incidental effects in other jurisdictions." Id. at 370.

> Were it otherwise, nearly every aspect of substantive state law would be disabled from affecting the conduct of multi-state corporations. When New Jersey law imposes a legal duty on the volitional behavior of a contracting party, that ruling will often have effects beyond state boundaries. For example, if the issue in this case were that of straight contract law, i.e., had the contract precluded termination of the out-of-state territory, the New Jersey common law upholding the contract would be regulating commerce that takes place wholly outside of the state's borders. [Id. at 369]

"In terms of state power, whether state contract law or state statutory law is applied to the in-state activity makes no difference." Ibid.

For these purposes, the New Jersey Supreme Court observed, the due process standard for choice of law, requiring contacts with the forum, interests arising from those contacts and fairness to the defendant, echoed the Commerce Clause balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970), in terms of legitimacy of the local interest and the reasonableness of the regulation. 130 N.J. at 369. In this situation:

> [f]airness to the defendant is implicit in the statute's requirements. By definition, the Act, and particularly its community-of- interest requirement, is intended to protect business parties who made a franchise-specific capital investment of either goods or services in New Jersey. [Citation omitted] Thus the statute's own terms, including the community-of-interest and good-cause requirements, will allow the application of the Act only in situations in which there are "contacts" with the forum, "interests" arising out of those contacts, and "fairness to the defendant" in the sense that a defendant who acts fairly with a franchisee need fear no oppressive regulation. Therefore, the Act's own terms curtail any impermissible extraterritorial effect and ensure its constitutionality under Commerce Clause or due-process analysis despite some incidental extraterritorial effects.[1] [Id. at

---

[1] The New Jersey Supreme Court's remarks concerning the "community-of-interest" and "good cause" requirements were references to certain portions of the Franchise Practices Act. The statute defines "franchise" as

> a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of

A "critical factor in this case" was

> the installed base of customers that ISI has built up over a twenty-year period. Because of the peculiar

---

> goods or services at wholesale, retail, by lease, agreement, or otherwise. [N.J.S.A. 56:10-3a.; emphasis added]

N.J.S.A. 56:10-5 declares that "[i]t shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause."

The terms "good cause" and "community of interest" have been given statutory and judicial definitions. Under the statute

> good cause for terminating, cancelling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise. [N.J.S.A. 56:10-5]

The "community of interest" standard

> is based on the complex of mutual and continuing advantages which induced the franchisor to reach his ultimate consumer through entities other than his own which, although legally separate, are nevertheless economically dependent upon him. [Instructional Systems, Inc. v. Computer Curri-culum Corporation, 130 N.J. at 358, quoting Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division, 190 N.J. Super. 153, 163 (App. Div. 1983)]

In the present case, the New Jersey Supreme Court concluded that there was a community of interest between CCC and ISI. 130 N.J. at 362-66. Indeed, "[b]ecause of the extraordinary and intricate relations that arise in the distribution of computer products, a 'close symbiotic relationship' arises almost of necessity between manufacturers and distributors or resellers." Id. at 366.

> relationship between the [computer] hardware and the software, to terminate the franchise arrangements could be devastating within that customer base and could allow the franchisor unconscionably to reap the harvest of the franchisee's long years of effort. [Id. at 371]

The New Jersey Supreme Court noted, however, that "a termination might not be equally devastating in all jurisdictions." Ibid. The finder of fact would therefore have to consider all pertinent circumstances to determine whether invocation of the statutory protection against unconscionable conduct is warranted. Ibid.

The New Jersey Supreme Court having issued this decision, the case returned to the United States District Court, whereupon the defendant CCC moved for partial summary judgment upon the contention that the Franchise Practices Act offended the Commerce Clause of the United States Constitution. The District Court on June 2, 1993 granted partial summary judgment in favor of CCC. Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 826 F. Supp. at 834. The New Jersey Franchise Practices Act was found to violate the Commerce Clause to the extent that it might be applied to commercial transactions outside of New Jersey, id. at 849-51, and almost all of Count I was dismissed with prejudice.[2] Id. at 855.

---

[2] The initial dismissal with prejudice of the entirety of Count I was later modified slightly to maintain the Count I allegations with respect to two states, New York and Massachusetts, because those states remained part of the ISI territory by virtue of a new reseller agreement signed in 1989.

The Court of Appeals reversed with respect to the Commerce Clause question.[3] The court first stressed that, CCC's argument to the contrary notwithstanding, the decision of the New Jersey Supreme Court during the State remand phase of the proceedings was binding as to the choice-of-law issue. Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 35 F. 3d at 823. In Pullman and England:

> [t]he Supreme Court did not expect the state courts to issue abstract opinions of law, removed from the facts of the case, or resolve factual disputes only to have them treated as advisory opinions. Instead, the Court anticipated that the state court decision might resolve the suit entirely. [Id. at 822]

The parties were thus bound by the State court judgment "even in the rare Pullman abstention case such as this, where the state court must resolve factual disputes or engage in a totality-of-the-circumstances analysis in reaching its conclusions." Id. at 823. With respect, then, to whether the parties' agreement was covered by the Franchise Practices Act, "we are bound to accept [the New Jersey court's] answer (yes), as well as the factual and legal findings necessary to that answer." Ibid.

With respect to the Commerce Clause question proper, the Third Circuit said:

> [It] is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects. The Supreme Court has never suggested that the dormant Commerce Clause requires Balkanization,

---

[3] The court affirmed the District Court judgment with respect to its entry of summary judgment favoring CCC on Counts II through VII. Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 35 F. 3d at 827, n. 19. This aspect of the Third Circuit opinion does not figure in the pending petition for certiorari.

> with each state's law stopping at the border. [Id. at 825]

In traditional contract litigation, courts must apply some State's law to interpret the contract, and

> [w]hile a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state. [Ibid.]

Again contrary to CCC's argument, there was no distinction to be drawn between such an ordinary interpretive rule of State contract law and a state statute.

> The construction of a contract, including the interpretive policies embodied in common law and statutory enactments, is no more or less regulatory than the [New Jersey Franchise Practices Act], which imposes on franchises governed by New Jersey law certain provisions designed to promote fairness between the parties. [Ibid.]

Such was not to say, the Court of Appeals emphasized, that New Jersey would have a right to apply the Act to any franchise agreement in the country as long as suit were brought in New Jersey. Ibid. Nothing in the statutory text reached that far, however, for the statutory language itself limited the Act's compass to franchises the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, N.J.S.A. 56:10-4, and the New Jersey Supreme Court had held that the Act by its own terms allows the application of statutory requirements only to situations in which there are contacts with the forum and interests arising out of those contacts. Instructional Systems, Inc. v. Computer

Curriculum Corporation, supra, 130 N.J. at 370-71. 35 F. 3d at 825.

> In this case the record is clear that it was the parties, not New Jersey, who contemplated that the franchisee maintain a place of business in New Jersey. And it was the parties, not New Jersey, who bound themselves to an exclusive multistate distribution agreement. Therefore, it is the parties' own agreement which operated to project the New Jersey law outside of New Jersey's borders, a result which CCC will find ironic but which inevitably follows from the choice-of-law analysis. [Ibid.]

It was this circumstance which distinguished this case from the liquor affirmation cases decided by this Court. In Healy v. Beer Institute, Inc., 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed. 2d 275 (1989), and Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed. 2d 552 (1986), the price-affirmation statutes involved were designed such that a liquor supplier's price in other States would be dependent on the prices which it posted in the State enacting the regulation. Id. at 825-26. Thus, "in these cases it was the state, operating independently of any parties' contract, which dictated the extraterritorial effect." Id. at 826. Such was not the situation here. The Third Circuit acknowledged that if the parties were subject to inconsistent legislation from different States, the practical effect of a particular law might lead to a Commerce Clause violation, but there must be shown actual conflict among State regulations for this result to occur. Ibid. State laws which merely create additional, but not irreconcilable, obligations are not to be deemed "inconsistent" for this purpose. Ibid. In general, consequently:

> [t]he essence of CCC's objection, despite its assurance to the contrary, goes to New Jersey's decision on choice of law. Having accepting that decision, as we must, we see no facial conflict between the [New Jersey Franchise Practices Act] and the dormant Commerce Clause. [Ibid.]

Having found the New Jersey statute not to be per se invalid, id. at 824-26, the Court of Appeals then considered the constitutionality of the statute under the balancing standard enunciated by this Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970). Applying this settled law, the Court of Appeals found it clear that the New Jersey Franchise Practices Act imposed no burden on interstate commerce inasmuch as the Act was facially neutral with respect to the interstate nature of the parties' agreement. Id. at 827. CCC contended that the statute imposed a straightjacket on its operations and ultimately harmed consumers by prohibiting the creation of an efficient distribution system.

> But even assuming this to be true, it is indisputable that the statute simply does not differentiate between in-state and out-of-state franchisors. The limitation on termination of franchises to reasons of good cause is equally applicable to New Jersey-based franchisors as to those headquartered elsewhere. Thus, although the [Franchise Practices Act] may burden commerce, it creates no incidental burdens on interstate commerce for purposes of Pike balancing. [Ibid.]

Because of the absence of such a burden, there was no need to consider the putative local benefits produced by the Act. Ibid.[4]

CCC has now petitioned this Court for certiorari. This brief opposes that petition.

[4] Having adjudicated the facial constitutionality of the statute, the Third Circuit withheld comment regarding whether the Act, when applied, might have a burdensome effect on interstate commerce. That issue could not be resolved as a matter of law and might have to await the interpretation given to the statutory provision concerning "good cause" for franchise termination. Ibid.

SUMMARY OF ARGUMENT

With the petitioner having abandoned its contention, previously pressed in both the District Court and the Court of Appeals, that the New Jersey Franchise Practices Act in its extraterritorial application was somehow "per se invalid" and apparently having now come to agree that the statute is facially neutral and nondiscriminatory, all parties now agree that the Pike v. Bruce Church dormant Commerce Clause balancing standard alone is applicable to this case. The Act plainly is constitutional under the Pike standard, for not only does it regulate even-handedly and thereby effectuate the legitimate local public interest of protecting franchisees from imposition by more powerful franchisors, but its extraterritorial effects -- its burden upon interstate commerce -- are minimal and incidental and certainly no greater than the effects which any State regulatory system inevitably will produce.

Moreover, the adverse ramifications of the holding which this petitioner wants from this Court are truly enormous and unsettling. In all subject areas, the petitioner would have not only the State legislatures, but also the State judiciaries, rendered powerless to protect classes of persons from unconscionable overreaching to the extent that the transactions in question have any effect in the interstate market. The petitioner wants in the interstate arena a supposedly constitutionally-mandated return to laissez faire, a result which most assuredly is not required by the dormant Commerce Clause or by any other constitutional provision. The petition for certiorari therefore should be denied.

ARGUMENT

NOT ONLY DOES THE NEW JERSEY FRANCHISE PRACTICES ACT CLEARLY REGULATE EVEN-HANDEDLY TO PROTECT FRANCHISEES FROM MORE POWERFUL FRANCHISORS WITH ONLY THE INCIDENTAL EFFECTS ON INTERSTATE COMMERCE PRODUCED BY ANY REGULATORY SCHEME, BUT THE HOLDING SOUGHT BY THIS PETITIONER WOULD PRODUCE LAISSEZ FAIRE IN THE INTERSTATE ARENA BY STRIPPING FROM THE STATES ALL REGULATORY POWER HAVING ANY EXTRA-TERRITORIAL EFFECT, AND THEREFORE THE PETITION FOR CERTIORARI SHOULD BE DENIED.

When reviewing the CCC petition for certiorari, this Court must, of course, consider the application from the perspective of the applicable legal standard, and the applicable legal standard is that enunciated in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970). Indeed, it must be stressed that the Pike v. Bruce Church standard is the only standard which this Court is being asked to consider. CCC, despite having persistently and vigorously argued in both the District Court[5] and in the Court of Appeals[6] that the New Jersey Franchise Practices Act in its extraterritorial application was somehow "per se invalid," has now abandoned that contention; as a corollary, CCC also apparently now agrees that the statute is facially neutral (Petition at 25) in that it does not discriminate

---

[5] Instructional Systems, Inc. v. Computer Curriculum Corporation, 826 F. Supp. 831, 847 (D.N.J. 1993).

[6] Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d 813, 824 (3d Cir. 1994).

between in-state and out-of-state franchisors (Petition at 27). Thus, all parties now agree that the Pike v. Bruce Church balancing standard alone is applicable to this case.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [397 U.S. at 142]

This formulation has often been stated and applied, but, as the Court of Appeals concluded, it is to be applied here upon the dual recognition that (1) some extraterritorial incidents of a State's law are inevitable and (2) from the perspective of the jurisdictions where those extraterritorial incidents occur, they will always inevitably be governed by the law of a "foreign" State. Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d at 825. Neither of these circumstances implicates the dormant Commerce Clause.

It is this latter proposition especially which cannot be denied. CCC may decry that part of the analysis that deals with choice of law (Petition at 22), but, as the Court of Appeals said, even "in traditional contract litigation, courts must apply some state's law to interpret the contract." Ibid. Law is, after all, essential to commerce; it is the oil that keeps the machinery of interstate commerce running. Some law must apply. That is the purpose of choice of law precepts. In consequence, it is understood that in some

circumstances relationships will be governed by rules of law specified by a State other than the State in which one or more of the parties are situated. The proposition is entirely unexceptionable.[7]

Equally unexceptionable is the fact that New Jersey has chosen to regulate franchising arrangements. The petitioner may suggest that New Jersey is one of "only" eighteen States that have adopted any form of a franchise termination statute and "only" one of nine States that compel the renewal of a franchise after its stated expiration date (Petition at 13), but those figures signify that fully one-third of the States are concerned enough about franchising to impose some regulatory limits and that 18% of the States deal in some respect with the adverse effects of unjust franchise termination. While the regulating States may vary in terms of the specific details of their legislative public policies and their ensuing regulatory requirements, the public policy findings declared by the New Jersey Legislature surely are not unreasonable.

> The Legislature finds and declares that distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare. It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in

---

[7] The proposition is, moreover, as applicable in the federal courts as in the State courts. It was in the Erie case, of course, Erie Railroad Company v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), that this Court repudiated the notion that federal courts in diversity actions are to apply a body of law other than the particular State law that ordinarily would govern the transaction. Cf. Swift v. Tyson, 41 U.S. 1, 10 L.Ed. 865 (1842). The State law which governs in the federal forum furthermore includes State choice of law. Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

> connection with franchise arrangements. [N.J.S.A. 56:10-2]

The Franchise Practices Act was intended to rectify the lack of equal bargaining power between franchisor and franchisee. Westfield Centre Service, Inc. v. Cities Service Oil Company, 86 N.J. 453, 462 (1981).

One would think from reading the petition for certiorari that extraterritorial application of this entirely understandable New Jersey public and legislative policy would constitute a steel gate descending into other jurisdictions and absolutely foreclosing CCC from ever selling any of its products there. One would think also that by virtue of the Act CCC is bound into a "perpetual relationship" with ISI (Petition at 18) irrespective of how poorly the franchisee might have fulfilled its franchise obligations. Such is simply not the law under the Franchise Practices Act. For there even to be a "franchise" under the Act, a "community of interest," with that term having specified requirements, must exist between the contracting parties.[8] See n., p. 5, supra. Furthermore, under N.J.S.A. 56:10-5:

> [i]t shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, cancelling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

---

[8] That the statute applies only when there is this community of interest between the parties underscores the fact that New Jersey has exercised its regulatory power precisely in those circumstances in which there is a bona fide State interest in protecting the weak from the strong.

It is true that the Legislature has thereby excluded what would ordinarily be deemed "bona fide business reasons" for terminating a franchise from the circumstances authorized under the statute. Westfield Centre Service, Inc. v. Cities Service Oil Company, 86 N.J. at 469. It is not true, however, that the franchisor has no recourse whatever.

> The evident purpose of the statutory and common law termination requirements ... is the protection of franchisees who have conscientiously striven to carry out their obligations under the franchise agreement. They were not intended to prevent the severance of those who deliberately disregard reasonable requirements contained in their contract with the franchisor. [Amerada Hess Corporation v. Quinn, 143 N.J. Super. 237, 254 (Law Div. 1976)]

Indeed, as when a franchisee violates laws pertaining to its operations, "protection of the public's welfare points toward termination of dishonest franchisees." Ibid. CCC has in fact asserted franchise noncompliance against ISI in this very litigation.

The New Jersey Franchise Practices Act plainly passes muster under the dormant Commerce Clause. The statute does regulate even-handedly -- even the petitioner so acknowledges -- and, beyond question, it does effectuate the legitimate local public interest of protecting franchisees from imposition by more powerful franchisors. Furthermore, CCC's argument to the contrary notwithstanding, the effects of the Act on interstate commerce are only incidental. The Commerce Clause focus cannot be on the facts that non-residents of New Jersey may be involved and that the goods -- the computer hardware and software, presumably -- would originate outside New Jersey and would move in interstate commerce without ever passing through New Jersey (Petition at 11). As will shortly be discussed, these

circumstances are often present, and not only when a State legislature enacts statutes. They are also present when the courts of a particular State refuse to enforce or alter a contract which has extraterritorial effects but is contrary to State public policy. Yet Commerce Clause invalidation of even such State judicial rulings is where the petitioner's theory inexorably leads. To paraphrase the law review commentary quoted by the Court of Appeals here, the prohibition on dormant Commerce Clause grounds of such clearly appropriate judicial decisions "would invalidate much too much legislation."[9] Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 35 F. 3d at 825, quoting Donald H. Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev 1865, 1878 (1987).

The extraterritorial effects in the present case are, it must be emphasized, by no means comparable to those in Healy v. Beer Institute, Inc., 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed. 2d 275 (1989). Healy concerned a liquor affirmation statute which required out-of-state shippers to make a contemporaneous affirmation that their posted prices for products sold to Connecticut wholesalers were at the time of posting no higher than the prices for the same products sold in bordering States. This Court invalidated the regulatory scheme because of a fundamental concern which does not exist in the present case.

> [T]he practical effect of this affirmation law, in conjunction with the many other beer-pricing and

---

[9] As will be discussed, State judicial decisions of this sort include such landmark precedents as Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960). Such decisions may appropriately be deemed "legislation," because, in addition to adjudicating the rights of the particular parties to the litigation, they also specify rules of conduct for the future. See 1 Kenneth Culp Davis, Administrative Law Treatise § 7.02, at 413 (1958).

> affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude. [491 U.S. at 337]

With each shipper being bound by the prices posted for that month of sales in every other State, the result would be "price gridlock" -- a "short-circuiting of normal pricing decisions based on local conditions ...." Id. at 340.

"Price gridlock" was indeed the concern, but the concern was also that the regulating State was taking advantage of more favorable economic conditions in other States. By means of its statute, Connecticut was in effect reaching out to the more favorable competitive conditions extant in other States and then importing those conditions into its own jurisdiction; by dint of its own otherwise limited regulatory authority, Connecticut was distorting each of the local markets all over the country and transmuting all of those individual markets into a kind of national market whose most advantageous outcome was directed toward Connecticut as beneficiary. That is not the situation here. New Jersey through its Franchise Practices Act is not reaching out to any condition that may be extant in some other State; New Jersey is not attempting to distort local markets elsewhere for its own benefit. Instead, it is simply mandating that those outside interests that choose to come into New Jersey abide by New Jersey's justifiable and entirely reasonable regulatory requirements.[10]

---

[10] The present case also is entirely unlike Edgar v. MITE Corporation, 457 U.S. 524, 102 S.Ct. 2629, 73 L.Ed. 2d 269 (1982), concerning the Illinois Business Take-over Act, which imposed restrictions upon tender offers for stock of a "target company." Because a company would meet the statutory definition of "target company" merely by being organized under Illinois law and having its principal executive office in that State, the statute on its face would apply "even if not a single one of the [target company's] shareholders were a resident of Illinois." 457 U.S. at 642. The MITE decision thus reflected a strong due process concern on the part

Others of the CCC arguments need be addressed only briefly. The present case obviously is not at all like the precedents of this Court concerning the "methods" or facilities by means of which goods are distributed in interstate commerce (Petition at 15). Cf., e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed. 1003 (1959); Southern Pacific Company v. Arizona ex rel. Sullivan, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). The New Jersey Franchise Practices Act does not act in any way even remotely comparable to regulations of train lengths and the like; the attempted analogy is nonsensical. Similarly, CCC may attempt to denigrate the finding of the Court of Appeals that it was the petitioner's own agreement with ISI that brought CCC under the umbrella of New Jersey law (Petition at 18-21), Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d at 825, but such is precisely what happened. The point is not, as CCC would have it (Petition at 19-20), that New Jersey has tried to coerce CCC into forfeiting some constitutional "right" to bring its business into the State. Rather, the point is, again, that in every commercial transaction the law of some State must apply and that CCC, a commercial entity not without adequate legal and other resources to research and deliberate contemplated business decisions, should have known that a decision to do business with a New Jersey franchisee would entail the New Jersey common and statutory law governing

---

of this Court, as is clear from this quotation:

> [A]ny attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power. [Id. at 643]

The quotation was taken from Shaffer v. Heitner, 433 U.S. 186, 197, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977), which had extended the minimum contacts requirement of in personam jurisdiction to in rem and quasi in rem jurisdiction. Plainly that concern is not present here.

franchising arrangements. The petitioner simply has no cause to complain.

While the foregoing discussion has addressed and answered the petitioner's various arguments, it is important to point out that, disguised beneath those arguments, much more is going on here. The petitioner's purpose is assuredly not to vindicate the interests of a national economic union which underlie the dormant Commerce Clause. CCC's purpose is, rather, considerably more provincial -- as a franchisor and presumably on behalf of all other franchisors in the Nation that award franchises having any multi-state effects, to be rid of any governmental regulation in the interstate arena. Beneath the Commerce Clause rhetoric, this petitioner wants a return to the Lochner era of laissez faire. Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

As far as CCC is concerned, the issue here is far broader than whether a State legislature may enact statutory law to protect franchisees from the disproportionate bargaining power enjoyed by typically vastly larger franchisors. For CCC, the question is whether even a State judiciary may draw upon the common law to protect a franchisee in the interstate market. For CCC, the words of the contract are sacrosanct, immune from alteration in the public interest by either legislature or court. If a contract has any effect whatever on interstate commerce, a State court may construe and enforce the contract, but only by using rules of contract interpretation which "honor the parties' agreement" (Petition at 19) and which "enforce contracts according to their terms" (Petition at 24, n. 25). There can be no State laws, whether legislative or court-made, that "are exercises of state power imposing restrictions on out-of-state distribution contrary to the terms of the contract" (Petition at 19). The intended result is obvious -- an interstate market which would be utterly free

of any control save the control exercised by the more powerful of contracting parties.

The implications of a holding by this Court that interstate commerce as a matter of constitutional law under the dormant Commerce Clause must be totally bereft of State regulation are thus enormous. The power of every State, reposed not only in its legislature, but also in its judiciary, to act protectively on behalf of its citizens would be stripped away insofar as there were any extraterritorial incidents of State regulation. The dormant Commerce Clause has never been understood that way, and, if it were, the new doctrine would radically change the judicial and legislative processes in all of the States. From the judicial standpoint, it has always been understood, in New Jersey and undoubtedly in most if not all of the other States, that "a contract is ... unenforceable where it is held to be contrary to public policy." Manning Engineering, Inc. v. Hudson County Park Commission, 74 N.J. 113, 138 (1977). This principle inevitably will often have some extraterritorial impact. If that impact is to be deemed unconstitutional, the very fabric of American law will be fundamentally changed, and not for the better.

For example, when the New Jersey Supreme Court in the seminal Henningsen decision announced that the New Jersey courts would not enforce automobile manufacturer and dealer warranties deemed contracts of adhesion, Henningsen v. Bloomfield Motors, Inc., n., p. ___, supra, 32 N.J. at 403-404, 406-408, it made that decision with respect to goods -- automobiles -- which were in the interstate stream of commerce. Doubtless, the restrictive New Jersey law had some effect on that interstate commercial stream, and not necessarily solely with respect to automobiles that would now be coming into New Jersey for sale. The New Jersey court-made law allowing greater manufacturer liability might well have induced manufacturers to build stronger, safer (and more expensive)

automobiles for sale in New Jersey, but as a practical matter those manufacturers would not have been likely to manufacture the same model of automobile under separate sets of quality standards, with one group of manufactured cars being destined for sale in New Jersey and the other group destined for sale in States having less demanding laws. Inevitably, therefore, New Jersey's more rigorous legal requirements would have an effect -- economists might even characterize it as a "distorting" effect -- on prices and perhaps on other circumstances involved in automobile sales in other States. Yet it never occurred to anyone that the New Jersey courts by virtue of the dormant Commerce Clause were bound to disregard the patent unfairness of the contract of adhesion and instead, in the words of the present petitioner, "honor the parties' agreement."

With regard in particular to franchising, the activity involved in the present case, New Jersey through both its courts and its Legislature has long expressed a public policy to counteract the bargaining unfairness which often is to be found in franchising arrangements. Significantly, CCC in this Court has abandoned its conceptually-doomed attempt to distinguish between State public policy regulation of contracts through judicial decision and State public policy regulation of contracts through legislation (Petition at 19), and for good reason. There is no such distinction. At the time of decision in Shell Oil Company v. Marinello, 63 N.J. 402 (1973), cert. den. 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974), the New Jersey Franchise Practices Act had been enacted, but because of the timing of its enactment was not applicable to the parties to the litigation. Id. at 409. Nevertheless, the New Jersey Supreme Court found in New Jersey common law public policy values identical to those articulated in the statute. It was apparent that

> Shell is the dominant party and that the relationship lacks equality in the respective bargaining positions

> of the parties. For all practical purposes Shell can dictate its own terms. The dealer, particularly if he has been operating the station for a period of years and built up its business clientele, when the time for renewal of the lease and dealer agreement comes around, cannot afford to risk confrontation with the oil company. He just signs on the dotted line. [Id. at 408]

The New Jersey Supreme Court therefore stated the common law and common sense principle.

> Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result. In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions which clearly tend to the injury of the public in some way. [Ibid.]

Under New Jersey common law, consequently, the contract would be read to mean that the franchisor did not have the unilateral right to terminate the franchise in the absence of a showing of good cause, i.e., that the franchisee had failed to substantially perform his obligations. Id. at 410-11. The common law standard chosen was identical to that articulated in the statute. N.J.S.A. 56:10-5.

Yet in Marinello too, there was some conceivable impact on interstate commerce which could conceivably have implicated the dormant Commerce Clause. The service station was located in Fort Lee, New Jersey, id. at 404, near the George Washington Bridge, a major transportation link between New Jersey and New York City, and conceivably the oil company, had it not been ordered by the New Jersey courts to keep the service station open in the absence of good cause for terminating the franchise, might have determined to forego the New Jersey location

entirely in favor of relocating to New York. Nevertheless, the dormant Commerce Clause argument seems to have slipped by all counsel as well as the court. The reason is obvious, as the Court of Appeals in the present case said.

> [I]t is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects. The Supreme Court has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border. [Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 35 F. 3d at 825]"

Again, the result urged by this petitioner is most remarkable. The result would not be comparable even to that of the long-overruled Swift v. Tyson, n., p. 16, supra, under which the governing law in federal court diversity cases was to be federal court-made law rather than the applicable State law. CCC does not want the interstate market in franchises to be governed by federal court-made law; CCC wants that market to be governed by no law whatever, save judicial "enforce[ment] [of] contracts according to their terms" (Petition at 24, n. 25). If pressed, the petitioner under its theory of this case probably would concede that it could be subjected to governmental regulation imposed either by Congressional legislation applicable to the entire Nation or imposed by some uniform statute adopted verbatim by each of the fifty States.[11] Both

---

[11] The most obvious example of a uniform statute is, of course, the Uniform Commercial Code. In actuality, the UCC in most respects has been adopted in substantially identical form in all fifty States, but one must wonder how the petitioner would argue if New Jersey, of all the States, were the only one to have adopted the provision of Article 2 concerning unconscionable contracts.

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the

of these alternatives are nonetheless entirely unlikely, and in their absence, CCC would be pleased to enjoy the laissez faire benefits of a regulatory desert.

Such a regulatory desert does not exist, however, and it certainly is not required by the dormant Commerce Clause. The local benefits to be weighed under the Pike v. Bruce Church balancing standard are unquestionably substantial, and the burden upon interstate commerce is minimal -- certainly no greater than the effect which any State regulatory system inevitably will produce. As noted previously, moreover, the ramifications of what CCC wants from this Court are truly enormous and unsettling. The petitioner may or may not be correct in its description of how various of the States prefer to deal with franchising in particular (Petition at 13). The petitioner nonetheless is most certainly incorrect in its implication that each of the other forty-nine States would be pleased to have its regulatory power, judicial as well as legislative, amputated at its border notwithstanding the realistic and common sense understanding that a very substantial proportion of commercial transactions having a nexus to the regulating State will inevitably have some extraterritorial incidents.[12]

---

unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [N.J.S.A. 12A:2-302(1)]

One may consider in this hypothetical situation a contract between parties which had a sufficient due process nexus to New Jersey to justify the application of this New Jersey statutory law by a New Jersey court, but which nonetheless implicated another jurisdiction because that was where one of the contracting parties resided. Under the CCC theory, despite the fact that the New Jersey court would be wholly justified under accepted choice-of-law principles in applying New Jersey law, it would be precluded from doing so by the supposed demands of the dormant Commerce Clause. The proposition on its face makes no sense whatever.

[12] The New Jersey Supreme Court in this case made the point cogently by hypothesizing an automobile dealership franchise located in northernmost New Jersey but covering southern New York. The court

The States may vary in their regulatory treatment of franchising specifically, but they do not vary in their broader desire to afford protection in innumerable subject areas to innumerable classes of persons within their jurisdiction. The States are not to be shorn of that authority.

Clearly, then, this petitioner simply wants laissez faire in the interstate market -- a regime in which the more powerful could control the less powerful through supposedly "consensual" agreements (Petition at 19) which are to be enforced solely "according to their terms" (Petition at 24, n. 25). The novel constitutional doctrine which CCC would have this Court announce would in this case be applied to franchising, but by its nature it would apply to all manner of other commercial transactions. It would fundamentally change the American legal system. Nothing in the dormant Commerce Clause or anywhere else in the Constitution supports this sort of radical alteration, and therefore the petition for certiorari should be denied.

---

could not conceive that the New Jersey Legislature would be indifferent to the dealer's plight if, after his or her having made a substantial investment in the franchise and having created a market for the franchisor's vehicle in southern New York, the franchisor without good cause took over the sourthern New York market for itself. Instructional Systems, Inc. v. Computer Curriculum Corporation, supra, 130 N.J. at 345. This hypothetical situation and the entirely understandable legislative and judicial response to it only underscore how nonsensical is the notion that, in the words of the Court of Appeals, "the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border." Instructional Systems, Inc. v. Computer Curriculum Corporation, 35 F. 3d at 825.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

Deborah T. Poritz
Attorney General of New Jersey
Attorney for State Respondent

Joseph L. Yannotti
Assistant Attorney General
Of Counsel

Bertram P. Goltz, Jr.
Deputy Attorney General
Counsel of Record and On the Brief

R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(201) 648-4876

Dated: January 17, 1995